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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JUANITA MARES MARQUEZ,) NO. ED CV 09-1921-E
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 MICHAEL J. ASTRUE, COMMISSIONER) AND ORDER OF REMAND
15 OF SOCIAL SECURITY ADMINISTRATION,)
16 Defendant.)
17

18 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
19 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
20 judgment are denied and this matter is remanded for further
21 administrative action consistent with this Opinion.
22

23 PROCEEDINGS
24

25 Plaintiff filed a complaint on October 15, 2009, seeking review
26 of the Commissioner's denial of benefits. The parties filed a consent
27 to proceed before a United States Magistrate Judge on November 19,
28 2009. Plaintiff filed a motion for summary judgment on March 18,

1 2010. Defendant filed a motion for summary judgment on April 19,
2 2010. The Court has taken both motions under submission without oral
3 argument. See L.R. 7-15; "Order," filed October 15, 2009.

4
5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
6

7 Plaintiff alleges disability since July 15, 2004, based primarily
8 on alleged pain in her back, neck, left hand and right foot
9 (Administrative Record ("A.R.") 73-75, 97, 223-27). Plaintiff
10 testified to pain of allegedly disabling severity (A.R. 226-27). In a
11 written report, Plaintiff stated:

12
13 I do not have health insurance. And due to my low income I
14 can not afford to go to a doctor, I have gone to the
15 hospital as an emergency, because I could no longer stand
16 the pain, they gave a shot of cortozon [sic], and it help
17 [sic] some. I have to suffer the pain. I take pain pills
18 over the counter, as needed (A.R. 100-01).
19

20 Plaintiff also testified that she does not have Medi-Cal (A.R. 224).
21

22 The Administrative Law Judge ("ALJ") found Plaintiff's back
23 condition severe, but deemed her alleged hand and foot problems non-
24 severe (A.R. 17-18). The ALJ stated that "[t]he record is very
25 limited and there are no follow-up treatment notes with respect to
26 these conditions [referring to the alleged hand/wrist and foot
27 problems]" (A.R. 18). The ALJ found Plaintiff's testimony concerning
28 allegedly disabling pain not to be credible (A.R. 20). In support of

1 this finding, the ALJ stated, inter alia, that Plaintiff "received
2 conservative treatment, she was not prescribed severe pain medication;
3 and she did not receive regular treatment" (A.R. 20).

4
5 Contrary to the opinion of Plaintiff's treating physician,
6 Dr. Schmidt, the ALJ found that Plaintiff retains a residual
7 functional capacity sufficient to perform her past relevant work (A.R.
8 19-22; see A.R. 167-72 (opinion of Dr. Schmidt)). In discounting
9 Dr. Schmidt's opinion, the ALJ mentioned, inter alia, "the subsequent
10 record, which lacked follow-up treatment regarding the claimant's left
11 wrist/hand and right foot" (A.R. 21).

12
13 The ALJ's decision does not address Plaintiff's explanations
14 regarding why she failed to seek more regular treatment (A.R. 16-22).
15 The Appeals Council denied review (A.R. 3-5).

16 17 STANDARD OF REVIEW

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19 Under 42 U.S.C. section 405(g), this Court reviews the
20 Commissioner's decision to determine if: (1) the Commissioner's
21 findings are supported by substantial evidence; and (2) the
22 Commissioner used proper legal standards. See Swanson v. Secretary,
23 763 F.2d 1061, 1064 (9th Cir. 1985).

24 25 DISCUSSION

26
27 Social Security Ruling 96-7p provides:

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1 [T]he adjudicator must not draw any inference about an
2 individual's symptoms and their functional effects from a
3 failure to seek or pursue regular medical treatment without
4 first considering any explanations that the individual may
5 provide, or other information in the case record, that may
6 explain infrequent or irregular medical visits or failure to
7 seek medical treatment . . . For example: . . . The
8 individual may be unable to afford treatment and may not
9 have access to free or low-cost medical services.

10
11 Social Security rulings such as SSR 96-7p are "binding on ALJs."
12 Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990); see 20
13 C.F.R. § 422.408.

14
15 In the present case, the ALJ erred by relying, at least in part,
16 on the irregularity of treatment without expressly considering
17 Plaintiff's proffered explanation for the irregularity. See SSR 96-
18 7p; Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007) ("Orn's failure
19 to receive medical treatment during the period that he had no medical
20 insurance cannot support an adverse credibility finding"); Ostalaza v.
21 Astrue, 2009 WL 3170089, at *7 (C.D. Cal. Sept. 30, 2009) ("the ALJ
22 did not consider Plaintiff's testimony that she was denied Medi-Cal
23 insurance in 2004 . . . the ALJ was required to address this testimony
24 before discounting her credibility on the ground that she had received
25 only conservative care"); Wright v. Astrue, 2009 WL 2827576, at *10-11
26 (D. Or. Aug. 24, 2009) ("her failure to seek out treatment more
27 frequently during a period in which she was uninsured is not a
28 legitimate basis for finding she lacks credibility").

1 Given the uncertainty surrounding the extent to which these
2 errors may have affected the ALJ's decision, including the ALJ's
3 determinations to reject Plaintiff's credibility and to discount
4 Dr. Schmidt's opinion, the Court is unable to conclude that the errors
5 were harmless. See Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th
6 Cir. 1990) ("We are wary of speculating about the basis of the ALJ's
7 conclusion . . ."); see also Lewin v. Schweiker, 654 F.2d 631, 634-35
8 (9th Cir. 1981) (ALJ's decision should include a statement of the
9 subordinate factual foundations on which his or her ultimate factual
10 conclusions are based, so that a reviewing court may know the basis
11 for the decision).

12
13 When a court reverses an administrative determination, "the
14 proper course, except in rare circumstances, is to remand to an
15 administrative agency for additional investigation or explanation."
16 INS v. Ventura, 537 U.S. 12, 16 (2002). Remand is appropriate in the
17 present case. See Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir.
18 2003) ("Connett") (remand is an option where the ALJ fails to state
19 sufficient reasons for rejecting a claimant's excess symptom
20 testimony); but see Orn v. Astrue, 495 F.3d 625, 640 (9th Cir. 2007)
21 (appearing, confusingly, to cite Connett for the proposition that
22 "[w]hen an ALJ's reasons for rejecting the claimant's testimony are
23 legally insufficient and it is clear from the record that the ALJ
24 would be required to determine the claimant disabled if he had
25 credited the claimant's testimony, we remand for a calculation of
26 benefits") (quotations omitted); see also Vasquez v. Astrue, 572 F.3d
27 586 (9th Cir. 2009) (agreeing that a court need not "credit as true"
28 improperly rejected claimant testimony where there are outstanding

1 issues that must be resolved before a proper disability determination
2 can be made).¹

3
4 The Ninth Circuit's decision in Harman v. Apfel, 211 F.3d 1172
5 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) ("Harman") does not
6 compel a reversal rather than a remand of the present case. In
7 Harman, the Ninth Circuit stated that improperly rejected medical
8 opinion evidence should be credited and an immediate award of benefits
9 directed where "(1) the ALJ has failed to provide legally sufficient
10 reasons for rejecting such evidence, (2) there are no outstanding
11 issues that must be resolved before a determination of disability can
12 be made, and (3) it is clear from the record that the ALJ would be
13 required to find the claimant disabled were such evidence credited."
14 Harman at 1178 (citations and quotations omitted). Assuming,
15 arguendo, the Harman holding survives the Supreme Court's decision in
16 INS v. Ventura, 537 U.S. 12, 16 (2002),² the Harman holding does not
17 direct reversal of the present case. Here, the Administration must
18 re-address "outstanding issues" "before a determination of disability
19 can be made." Further, it is not clear from the record that the ALJ
20 would be required to find Plaintiff disabled for the entire claimed
21 period of disability were the opinion of the treating physician
22 credited.

23 ///

25 ¹ There are outstanding issues that must be resolved before
26 a proper disability determination can be made in the present case.

27 ² The Ninth Circuit has continued to apply Harman despite
28 INS v. Ventura. See Vasquez v. Astrue, 572 F.3d 586, 597 (9th Cir.
2009); Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004).

1 **CONCLUSION**

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3 For all of the foregoing reasons,³ Plaintiff's and Defendant's

4 motions for summary judgment are denied and this matter is remanded

5 for further administrative action consistent with this Opinion.

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7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: April 27, 2010.

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11 _____/S/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE

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24 ³ The Court has not considered issues raised in the

25 parties' motions but not discussed herein. The Court does note,

26 however, an apparent factual error in Defendant's Motion.

27 Defendant's Motion states: "The ALJ cited evidence that Plaintiff

28 received only conservative treatment, with non-steroidal anti-

inflammatory (as opposed to narcotic) pain medications . . ."

(Defendant's Motion at 8). In fact, Plaintiff sometimes received

Darvocet (A.R. 188). Darvocet is a narcotic pain medication. See

Hayes v. Snyder, 546 F.3d 516, 521 (7th Cir. 2008).